IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

R.S.A. No. 44 of 1991
Date of Decision: 22.11.2006

Shiv Narain and others.

..... Appellants

Versus

Sant Gopal and others.

..... Respondents

CORAM: Hon'ble Mr.Justice Mahesh Grover

....

Present: Shri M.L. Sarin, Senior Advocate with Shri Jaspal Singh, Advocate for the appellants.

Shri R.S.Mittal, Senior Advocate with Shri Atul Gaur, Advocate for the respondents.

....

Mahesh Grover,J.

The present Regular Second Appeal has been directed against judgments and decrees dated 5.11.1984 and 27.9.1990 passed by Additional Senior Sub Judge, and Additional District Judge, Faridabad, respectively.

The plaintiffs-appellants filed a suit against the defendants-respondents seeking possession of the shop in dispute, as also for recovery of Rs.1800/- as mesne profits for use and occupation thereof. It was

pleaded that Richhpal Singh, father of appellant nos. 1 to 4 and husband of Smt. Kapuri Devi (arrayed as plaintiff no.5 before the trial Court and appellant no.5 before the lower Appellate Court, now dead) got the shop in dispute along with other properties in a family arrangement dated 20.2.1956. The said shop was mortgaged by Richhpal Singh with one Bhagwati Devi vide deed dated 13.3.1957, but the mortgage was got redeemed on 30.12.1963. Richhpal Singh died in January,1969 and thereafter the appellants came into possession of the shop as exclusive owners. The shop was being rented out to different tenants and ultimately, the respondents were inducted as licencees in the month of June,1977. After the revocation of the licence on 11.1.1980, the respondents refused to vacate the shop necessitating the institution of the suit.

The respondents contested the suit and apart from raising technical objections, pleaded the ownership of the shop in question and in the alternative, they pleaded adverse possession. The family arrangement was disputed to say that even though, an attempt had been made on 20.2.1956, but the family partition was never completed and was never acted upon. Rather, an oral agreement was made in the year 1952 which was acted upon and the suit property had fallen to the share of respondent no.1-Sant Gopal. It was further pleaded that a family partition was effected around the year 1952 which fact is borne out from the suit filed by Bhajan Lal, another brother of Richhpal Singh in which the details of the family partition had been given and the statement of Richhpal Singh had been recorded admitting the claim of Bhajan Lal. The plea of partition dated 20.2.1956 was sought to be repudiated on the following grounds:-

"(a) According to the writing dated 20.2.1956, Sant and Bishan Lal were to get equal shares out of four Kanals of land situated in Mauza Wazirpur by perpetual lease with them, but the said land was partitioned vide registered partition deed dated 17.9.59 according to which the land was given to Bhajan Lal alone.

(b) Bhajan Lal was minor at the time of alleged writing dated 20.2.1956.

(c) It was recited in document dated 20.2.1956 that in case of any deficiency in the share of Bhajan Lal, same would be made good from the share of Richhpal Singh but in fact the deficiency was made good from the share of Defendant No.1, Sant Gopal.

(d) The writing dated 20.2.1956 stipulated that the liabilities that remained would be discharged by all the four brothers in equal shares but Sant Gopal discharged the some of the debts which were owed by Richhpal Singh.

(e) On 20.2.1956, it was recited that Sant Gopal and Bhajan Lal, would got 63 Kham Bighas of perpetual leased land of Mauza Mawai but then was not acted upon. As per registered partition dated 17.9.59 Bhajan Lal got approximately 32 Bighas of Khem Land and this land is situated along the road leading to Wazirpur from Faridabad. The land coming to the share of Sant Gopal only about the road upto the length of about 1/4th killa. In this manner, Sant

Gopal got only1/4t value of the land according to the estimate value of consideration of holding operations.

(f) The writing dated 20.2.1956 laid down that the dues of property tax upto 28.2.1956 would be paid by all the four brothers but defendant no.1 alone paid property tax of the entire properties upto the year 1959."

The trial Court dismissed the suit, which resulted in appeal by the appellants before the lower Appellate Court. Respondent nos. 1 and 2 also filed cross appeal/objections challenging some of the findings of the trial Court. The lower Appellate Court, vide its judgment and decree dated 27.9.1990, dismissed the appeal of the appellants and accepted the cross objections filed by respondent nos. 1 and 2 deciding issue nos. 1 and 11 in their favour. Hence, this Regular Second Appeal by the appellants.

At the very out-set, Shri M.L.Sarin, learned Senior Advocate appearing for the appellants contended that as a result of the partition which took place in the year 1952 and reduced into writing on 20.2.1956 (as Exhibit P16 on record), the shop in dispute bearing no.118, situated in Ward No.7, Main Bazar, Old Faridabad and a vacant plot came to the share of Richhpal Singh, predecessor-in-interest of the appellants. The respondents admitted the factum of the shop being given to Richhpal Singh, but pleaded that it had been transferred to Sant Gopal, respondent no.1, by way of oral transaction. Civil Suit No.301 of 10.8.1979 filed by Subhash Chand son of Sant Gopal (respondent no.3 in the present appeal) against the appellants for permanent injunction and ownership was adjudicated upon wherein the learned trial Court categorically held the appellants to be the owner of the

plot on the basis of the family settlement alluded to above. Shri Sarin urged that learned trial Court, vide its judgment and decree dated 5.11.1984 passed in the said suit, upheld the family settlement of 20.2.1956 and had determined the rights of the appellants flowing therefrom. The appeal filed by Subhash Chand against judgment and decree dated 5.11.1984 was dismissed by the Additional District Judge-II, Faridabad vide his judgment dated 18.12.1985 and that of the appellants herein was accepted and the suit was dismissed in toto. He submitted that Subhash Chand filed R.S.A.No.238 of 1986 against the judgments and decrees of the Courts below, which was dismissed by this Court in limine on 25.9.1986. The judgment and decree dated 18.12.1985 of the Additional District Judge-II, Faridabad had been brought on the record by way of additional evidence which was allowed by the lower Appellate Court on 18.11.1986, but the same were totally ignored at the time of passing of the impugned judgment and decree dated 27.9.1990. Once the family settlement dated 20.2.1956 had been upheld, the findings of the lower Appellate Court, on the face of it, were erroneous and contradictory to the judgment and decree dated 18.12.1985 which were affirmed by the High Court in R.S.A. No.238 of 1986. Learned counsel placed reliance on the judgment of a learned Single Judge of this Court in Jagir Kaur and another Versus Nirmal Singh and another, reported as 1993(2) P.L.R. 374 to contend that the matter, in such peculiar circumstances, deserves to be remanded back to the lower Appellate Court for fresh decision by taking into account the findings of the Courts below in the aforementioned judgment and decree dated 18.12.1985 pertaining to the same family partition and inter se between the same

parties.

The contentions raised by the learned counsel for the appellants were sought to be repelled by Shri R.S.Mittal, learned Senior Advocate appearing for the respondents by arguing that even though, judgment and decree dated 18.12.1985 were produced by way of additional evidence, yet, the same cannot be considered at this stage as the attention of the learned lower Appellate Court was not drawn to the same implying thereby that the appellants had not raised the issue.

I have heard learned counsel for the parties at some length and have also examined the record with their assistance. In my opinion, the question of law that arises for determination in this appeal is as to "whether the judgment and decree of the lower Appellate Court are liable to be set aside on the short ground that after allowing additional evidence vide order dated 18.11.1986, the Court did not even refer to the same while deciding the appeal."

A perusal of judgment and decree dated 18.12.1985, the documents which were the subject-matter of additional evidence before the lower Appellate Court, undoubtedly, reveals that a finding has been recorded regarding family settlement dated 20.2.1956 from which the rights of the appellants flowed. Even the respondents have admitted the fact that the shop had come to the share of Richhpal Singh, predecessor-in-interest of the appellants, but had pleaded that the same had come to them by way of oral transfer. The plea, on the face of it, is unpalatable, especially in view of the fact that Subhash Chand (respondent no.3), who is son of respondent no.1- Sant Gopal had filed suit no.301 of 10.8.1979 laying his claim of

ownership to the vacant plot. If the ownership of the shop in question is also disputed, it implies that Richhpal Singh got nothing by way of family partition. In any eventuality, it is clear that the lower Appellate Court had not taken into consideration the findings recorded by the Additional District Judge in his judgment and decree dated 18.12.1985 even though the same had been adduced by way of additional evidence. It was imperative for the lower Appellate Court to have looked into the findings recorded in the proceedings inter se between the parties and especially in view of the fact that the family settlement dated 20.2.1956 was the bane of controversy in both the proceedings. The lower Appellate Court was, therefore, clearly in error by ignoring the judgment and decree dated 18.12.1985, more-so when a detailed and reasoned order had been passed while allowing the prayer for additional evidence. Once the Court allows such a prayer, it is cast with a duty to examine the evidence so adduced and its impact on the controversy at hand, otherwise the production of such evidence would be an exercise in futility and it would seriously prejudice the case of the person at whose instance the evidence has been adduced.

Hence, without probing deeper into the merits of the case, I am of the opinion that the case deserves to be remanded back for fresh decision by taking into account the judgment and decree dated 18.12.1985 produced on record by way of additional evidence, non-consideration of which has resulted in contradictory findings with regard to family settlement dated 20.2.1956 from which rights of the parties flow.

On the basis of the above discussion, the impugned judgment and decree are set aside and the case is remitted to District Judge,

Faridabad, who shall proceed to determine the controversy by taking into account the judgment and decree referred to above. The parties are directed to appear before the Court of District Judge, Faridabad on 21.12.2006. Keeping in view the fact that the parties have been litigating since long, District Judge, Faridabad is directed to decide the matter within a period of four months from the date when the parties enter appearance.

Resultantly, the question of law stands answered as above and the appeal is allowed, leaving the parties to bear their own costs.

November 22,2006 (Mahesh Grover)
"SCM" Judge